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PETITION FOR CERTIORARI

NO. 629

IN THE

Supreme Court of The United States

October Term, 1967

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
Petitioner

vs.

STANLEY SHEFTIC, and
JOHN HOWARD RUNYON, JR.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia

MORTON I. TABER
Assistant Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia

LEO CATSONIS
Assistant Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia
Attorneys for Petitioner

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NO._____

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Otto C. Boles, Warden of the West Virginia Penitentiary, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 4, 1967. A timely petition for rehearing was denied on June 19, 1967.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 4, 1967. A timely petition for rehearing was denied on June 19, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED

Where a State provides a post conviction review procedure by which a State prisoner is afforded a full and fair evidentiary hearing and appeal therefrom, should the federal courts permit a State prisoner to deliberately by-pass this procedure and allow him to use the federal court as the initial fact-finding forum.

CITATION OF OPINIONS BELOW

Stanley Sheftic:

An application to the United States District Court for the Northern District of West Virginia for a Writ of Habeas Corpus was summarily dismissed, with no memorandum having been filed, but as set forth in the Order dated January 12, 1966, "* * * for reasons set forth in a written Memorandum filed in the case of Jack M. Miller vs. Otto C. Boles, Warden, Civil Action File No. 468-E, dated November 23, 1965 * * *", reported in 248 F. Supp. 49 (see Appendix hereto P. A-1). The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the District Court, is reported in 377 F. 2d 423. A petition to the United States Court of Appeals for the Fourth Circuit for a rehearing en banc was summarily denied on June 19, 1967 (see Appendix hereto P. A-25, A-33).

John Howard Runyon, Jr.:

An application to the United States District Court for the Northern District of West Virginia for a Writ of Habeas Corpus was summarily dismissed, with no memorandum having at the time been filed, but as set forth in the Order dated January 12, 1966, "* * *

for reasons set forth in a written Memorandum filed in the case of Jack M. Miller vs. Otto C. Boles, Warden, Civil Action File No. 468-E, dated November 23, 1965 * * *", reported in 248 F. Supp. 49 (see Appendix hereto P. A-1). The District Court then filed a written Memorandum dated February 16, 1966 (see Appendix hereto P. A-24). The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the District Court, dated May 4, 1967, is reported in 377 F. 2d 423. A petition to the United States Court of Appeals for the Fourth Circuit for a rehearing en banc was summarily denied on June 19, 1967 (see Appendix hereto P. A-33).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Amendments 6 and 14.

Constitution of West Virginia:

Article I, Section 2.

Article III, Sections 10 and 14.

Article VIII, Sections 3 and 12.

28 U.S.C.A. § 2254, as amended.

West Virginia Code, Chapter 51, Article 1, Section 3, as amended

West Virginia Code, Chapter 51, Article 2, Section 2, as amended

West Virginia Code, Chapter 53, Article 4, Section 1, as amended

West Virginia Code, Chapter 53, Article 4A, Sections 1 and 3, as amended

The Official Code of West Virginia of 1931, Chapter 62, Article 8, Section 4.

STATEMENT

For clarity, the parties will be hereafter referred to by name or as petitioner and respondent as they appear in this application.

Respondent, Stanley Sheftic, pleaded guilty to two charges of breaking and entering and was sentenced to confinement in the State Penitentiary at Moundsville, Marshall County, West Virginia. Subsequent thereto, the Warden of the prison instituted proceedings under the West Virginia Habitual Criminal Statute [West Virginia Code, Chapter 62, Article 8, Section 4 (1931)], charging four previous felony convictions. The sole issue involved was Sheftic's identity. As was his right, a jury was impaneled to determine the issue. Sheftic was found to be the same person identified in the information filed by the Warden of having been convicted of at least two prior felony offenses and was sentenced to life imprisonment.

Respondent Sheftic has filed various petitions for writs of habeas corpus in the Supreme Court of Appeals of West Virginia. In the last petition filed in the West Virginia Court, Sheftic alleged that his guilty plea to the principal offense for which he was then serving a sentence had been coerced. The petition was denied without a hearing on November 23, 1964. The allegation of this factual issue had never been presented to the Circuit Court of Marshall County, West Virginia, or any other Circuit Court in the State of West Virginia, where a full and fair evidentiary hearing could have been held to resolve it.

The respondent, after having been denied the relief sought by the Supreme Court of Appeals of West Vir-

ginia, petitioned the United States District Court for the Northern District of West Virginia pursuant to 28 U.S.C. § 2241. The District Court dismissed Sheftic's petition pursuant to 28 U.S.C. § 2254; holding that he had not exhausted the remedies available in the Courts of the State of West Virginia.

Respondent, John Howard Runyon, Jr., represented by Court-appointed counsel, changed his plea from not guilty to guilty to the felony offense of breaking and entering and was sentenced to the West Virginia State Penitentiary at Moundsville, Marshall County, West Virginia, for a term of one to ten years. Runyon filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of West Virginia, alleging that he had been denied the right to the effective assistance of counsel. The petition was denied without a hearing on October 18, 1965. Respondent had never attempted to resolve the factual issue presented to the Supreme Court of Appeals of West Virginia by presenting it to the Circuit Court of Marshall County, West Virginia, or any other Circuit Court in the State of West Virginia.

Subsequently, Runyon petitioned the United States District Court for the Northern District of West Virginia for a writ of habeas corpus, raising the same factual issue as he had before. The District Court dismissed Runyon's petition pursuant to 28 U.S.C. § 2254, holding that he had not exhausted the remedies available in the Courts of the State of West Virginia.

Both Stanley Sheftic and John Howard Runyon, Jr., appealed the rulings of the District Court to the United States Court of Appeals for the Fourth Circuit. The

Court of Appeals reversed the judgment of the District Court by order dated May 4, 1967. *Sheftic* v. *Boles* and *Runyon* v. *Boles*, 377 F. 2d 423 (1967).

The petitioner petitioned the Court of Appeals for a rehearing en banc, which rehearing was summarily denied on June 19, 1967. The Court of Appeals subsequently, upon timely application, stayed the issuance of certified copies of the judgments in lieu of mandates pending a timely application by the petitioner to the Supreme Court of the United States for a writ of certiorari.

The District Court denied the petitions of the respondents for two paramount reasons. One being that, in each of the cases, the issues raised were factual in nature, the resolution of which necessitated a plenary hearing. Neither of the petitioners had ever sought a forum where the facts could have been developed but, to the contrary, sought relief in the Supreme Court of Appeals of West Virginia, where the procedures do not provide for evidentiary hearings. The second reason was that the District Court believed that the State should have the first opportunity to resolve such issues.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Court of Appeals, as is now becoming more evident, prevents the State of West Virginia from having the first opportunity to determine the claims and to correct any federal constitutional deprivations which may exist. The decision frustrates the attempts of the State of West Virginia to assure those persons who are accused of criminal

offenses that their constitutionally given rights, both federal and state, will be observed and that no person will be denied due process or the equal protection of the law.

The decision has the effect of and has contributed to a growing frequency of petitions being filed directly in the Supreme Court of Appeals of West Virginia, where, due to the relatively limited evidentiary procedures and the unavailability of formal hearings, the Supreme Court is compelled to resolve factual issues on the basis of the pleadings, affidavits, exhibits, etc., and the writ is often times refused as a result of the petitioner's failure to adequately develop the facts. The decision has made it possible for those persons seeking post-conviction review to avoid the adequate procedures provided by the State of West Virginia and thus circumvent both the obvious intent of the State to safeguard the constitutional rights of individuals and the desire of the federal courts to leave to the states the opportunity to do so.

(2) The Memorandum by the Honorable Robert E. Maxwell, Judge of the United States District Court for the Northern District of West Virginia, filed in the case of *Miller* v. *Boles*, 248 F. Supp. 49, is a comprehensive and exhaustive study of the law as applied to exhaustion of available state remedies required by 28 U.S.C. § 2254. The conclusions of the District Judge are sound and well reasoned. The rule announced thereby should be affirmed and adopted by this Court as the pronouncement of what constitutes the exhaustion of available state remedies insofar as 28 U.S.C. § 2254 requires. We urge that this Court give most careful consideration to the reasoning and conclusions

of Judge Maxwell and adopt the view expressed in his Memorandum as the rule of this Court.

(3) This Court has long taken the position that it is advisable to permit the State courts to manage their own affairs as to court procedures, especially with reference to criminal law. This apparently stems from the desire to limit federalism in State courts, an evil the Federal courst apparently are desirous of avoiding. However, since the 1963 cases of *Fay* v. *Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837, and *Townsend* v. *Sain*, 372 U.S.293, 83 S. Ct. 745, 9 L. Ed. 2d 770, habeas corpus petitions have more frequently been filed in both State and Federal courts primarily because of the more careful approach in determining whether there has been a knowing and intelligent waiver of a Federal constitutional right. In this keeping, and this court's efforts to establish realistic guidelines for State courts to follow in order to reduce the instances requiring Federal court intervention, Mr. Justice Brennan, in his concurring opinion in *Case* v. *Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965), in setting forth the guidelines for developing a desirable procedure for post-conviction review, said at page 347 of 381 U.S., *supra* the procedure: "xxx should be swift and *simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay* v. *Noia*, supra, it should eschew rigid and technical doctrines of forfeiture, waiver, or default. See *Douglas* v. *Alabama*, 380 U.S. 415, 422-423, 13 L. ed 2d 934, 938, 939, 85 S. Ct. 1074; *Henry* v. *Mississippi*, supra. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those

hearings. *Townsend* v. *Sain*, supra. It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts." Provision for counsel to represent prisoners, as in § 4 of the Nebraska Act. would enhance the probability of effective presentation and a proper disposition of prisoners' claims. The West Virginia Post-Conviction Review statute adequately provides for these procedures.

(4) The decision of the Court of Appeals appears to be based upon the following four grounds:

(a) That it would be futile to expect a circuit court to grant a hearing after the Supreme Court of Appeals had denied the prisoner relief on the identical claim he would urge before the circuit court.

(b) That the scope of habeas corpus in West Virginia is not akin to federal habeas corpus.

(c). That the West Virginia circuit courts do not grant full and fair evidentiary hearings.

(d) That it would be unfair to the respondents to require that they now avail themselves to state remedies before petitioning the federal court.

Ground (a), as does ground (c), presupposes that there had been a constitutional deprivation. However, the small percentage of cases arising out of West Virginia for which relief is granted by the federal courts is evidence to the contrary. It is becoming more evident, particularly since the passage of Chapter 53, Article 4A, of the West Virginia Code, the West Virginia Post-Conviction Review Statute, enacted and

effective since January 25, 1967, that the circuit courts of this State are not reluctant to grant a hearing on a petition for a writ of habeas corpus where a petition alleging the same grounds and raising the same issues has been previously filed in the Supreme Court of Appeals of West Virginia, and there denied. It is also becoming increasingly evident that a large percentage of those petitioners who are granted relief by the federal courts are those who did not first attempt to obtain a hearing under the state post-conviction review statute. The overall effect is to defeat the intent and frustrate the efforts of the State of West Virginia to protect the individual's constitutional rights.

Ground (b) is completely erroneous. The Constitution of West Virginia is patterned after the Constitution of the United States, and it guarantees the same rights and safeguards to individuals as does the latter. If there has ever been any serious question along this line, it has certainly been resolved by the enactment of Chapter 53, Article 4A, of the West Virginia Code, *supra*.

Ground (c) is as erroneous as ground (b). However, it should be pointed out that the enactment of West Virginia Code, Chapter 53, Article 4A, *supra*, which became effective just thirteen days after the District Court denied relief to the respondents, extended original jurisdiction of habeas corpus matters to all circuit courts and to certain courts of limited jurisdiction. It requires that a record of all proceedings be made. It has long been the policy of the State of West Virginia to appoint counsel for indigent petitioners. To say that West Virginia circuit courts do not grant full and fair evidentiary hearings is to reflect

adversely upon the honorable judges of the circuit courts and the members of the State Bar Association who have willingly and freely given of their time and energies to assure that constitutional rights have not been and will not be denied, and further infers that an attitude of indifference exists among those who are dedicated to the preservation of constitutional rights.

Whether or not requiring the respondents to present their claims to a circuit court before re-submitting the same to the district court would deny them a real benefit overlooks the fact that the respondents could have availed themselves of the State remedies well over a year ago. Had relief then been denied by the State courts, the respondents could have petitioned the United States District Court and by this time have had its decision.

The theory of "unfairness" also presupposes that the claims of the respondents will be resolved in their favor. If so, the State of West Virginia is entitled to the first opportunity through its very adequate procedures to correct whatever miscarriage there may have been.

(5) This court should take notice of the tremendous adverse impact of a pronouncement that petitioners for writs of habeas corpus need not seek a full and fair evidentiary hearing in West Virginia prior to seeking post-conviction review in a federal court. This court should also take note of the increased burden which will fall upon both the Supreme Court of Appeals of West Virginia and the United States District Courts having jurisdiction in the State of West

Virginia if the judgment of the Court of Appeals is permitted to stand.

(6) In addition to the foregoing, it is submitted that the issues presented herein should and must be determined and settled by the highest court of the land in order to give a solution to a problem which perplexes many district courts and thus give stability and consistency throughout the states and provide guidelines which can be followed by all of the jurisdictions.

It is contended that, even though the Constitution of West Virginia and the West Virginia statutes do create alternative methods by which post-conviction review might be had, it is necessary and of paramount importance that when the claim upon which the prayer for relief is grounded gives rise to a factual dispute, the State be entitled to the right and reasonable opportunity to determine the issues. Until the State has had such an opportunity, a petitioner should not be permitted to plead that he has exhausted the available State remedies. Federal permission to circumvent, avoid and frustrate the procedures and efforts of the states should not be given.

We, therefore, petition for redress in the most humble terms and solemnly call upon this court by our common desires, beliefs and dedications to disavow this usurpation of state judicial process.

CONCLUSION

For the foregoing reasons, we conclude as follows:

1. That this court should grant certiorari and reverse the judgment entered by the Court of Appeals

for the Fourth Circuit on May 4, 1967, and then decide the question as to whether or not the respondents had exhausted the State remedies available to them as required by 28 U. S. C. A. 2254, or,

2. That this court should grant certiorari and reverse the judgment entered by the Court of Appeals herein on June 21, 1967, and remand this case to the Court of Appeals with the direction to grant a rehearing en banc on the sole issue here presented.

Respectfully submitted,

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia

MORTON I. TABER
Assistant Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia

LEO CATSONIS
Assistant Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia
Attorneys for Petitioner

APPENDIX

JACK M. MILLER, Petitioner,

v.

OTTO C. BOLES, Warden of the West Virginia State Penitentiary, Respondent.

No. 468-E.

United States District Court
N. D. West Virginia.
Nov. 23, 1965.

State prisoner's habeas corpus petition. The District Court, Maxwell, Chief Judge, held that state prisoner who had not sought habeas corpus relief in state where he was incarcerated had not given state fair chance to determine factual issues in case and accordingly had failed to meet requirement of exhaustion of state remedies which is prerequisite to granting federal habeas corpus relief.

Petition dismissed.

1. Habeas Corpus 54

To satisfy exhaustion of state remedies requirement, state prisoner who seeks habeas corpus relief in federal court must allege that claim urged was determined at criminal trial and asserted as reversible error in application for writ of error or that time for appeal from conviction has expired, that he has unsuccessfully sought habeas corpus in state courts on same grounds urged in federal court, or that he did not pursue state remedies because it was obvious that state courts would not entertain claim, fully explaining why further state proceedings would be ineffectual and if possible citing legal authority to substantiate belief. 28 U.S.C.A. § 2254.

2. Courts 96, 97(1)

Decisions of United States Supreme Court are controlling on any court of the nation. U.S.C.A. Const. art. 6.

3. Habeas Corpus 45.3(1)

Rule requiring exhaustion of state remedies before federal habeas corpus may be sought is not jurisdictional but is grounded on principles of comity and is to be applied only after thorough consideration of peculiar practices and remedies available in particular state. 28 U.S.C.A. § 2254.

4. Habeas Corpus 45.3(1)

Requirement of exhaustion of state remedies in federal habeas corpus statute has not been met if state prisoner still has available state forum in which he can receive evidentiary hearing. 28 U.S.C.A. § 2254.

5. Habeas Corpus 45.3(1)

West Virginia prisoner who seeks to qualify for federal habeas corpus relief must first pursue proper available state remedy providing for full evidentiary hearing. 28 U.S.C.A. § 2254.

6. Habeas Corpus 85.1(1)

Absent plain contrary decision by state's highest appellate court, federal courts could presume that state habeas corpus would lie to test any constitutional denial.

7. Habeas Corpus 54

Applications for federal habeas corpus involving determination of disputed facts must affirmatively state that petitioner has previously sought resolution of factual controversy in proper state forum and thereafter sought appellate review of adverse determination on claim before federal petition will be entertained on merits. 28 U.S.C.A. § 2254.

8. Habeas Corpus 45.3(1)

State prisoner who had not sought habeas corpus relief in state where he was incarcerated had not given state fair chance to determine factual issues in case and accordingly had failed to meet requirement of exhaustion of state remedies which is pre-

requisite to granting federal habeas corpus relief. 28 U.S.C.A. § 2254.

C. Donald Robertson, Atty. Gen. of West Virginia, Thomas B. Yost, Asst. Atty. Gen. of West Virginia, for respondent.

MAXWELL, Chief Judge.

Jack M. Miller is a prisoner at the West Virginia State Penitentiary, Moundsville, serving a one to ten year sentence for grand larceny. He has petitioned this Court in forma pauperis for a writ of habeas corpus. Miller's petition states allegations, which, if true, would entitle him to Federal habeas corpus relief.[1]

However, for the reasons announced in this memorandum, Miller's petition is not considered on the merits, but dismissed for failure to exhaust available state remedies as required by 28 U.S.C. § 2254.

In declining to take jurisdiction of the case this Court is reversing its former practice. This is done to reaffirm and place in proper perspective the historic relationship between the Federal and State judiciaries in preserving and protecting the fundamental rights of the individual.

In announcing a new rule regarding the requirement of "exhaustion" found in 28 U.S.C. § 2254, this Court has the benefit of recent scholarly contributions, as well as the added illumination of Federal policy stated by the Supreme Court during the 1964 term. Before stating these new rules and their underlying rationale, the facts in Miller's case should first be surveyed.

Miller was found guilty by a jury and sentenced from one to ten years. He failed to appeal from his conviction. Thereafter he filed for a writ of habeas corpus in the West Virginia Supreme

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1. Miller's petition alleges that he was subjected to illegal interrogation by police without the offer of counsel and that his interrogators threatened him during the inquisition, thereby illegally inducing him to make an incriminatory statement which was used against him at trial.

Court of Appeals. His petition there stated grounds for relief substantially the same as the allegations he now attempts to urge upon this Court by way of Federal habeas corpus. Miller's state court petition was denied without further proceedings by the State high court. He next filed this petition for Federal habeas corpus.

Under the former practice of this Court, Miller's petition for State habeas corpus relief upon an original petition to the Supreme Court of Appeals of West Virginia, alleging claims similar to those submitted here, would have been an adequate showing that Miller had met the requirements of "exhaustion."[2] However, from this time forth such a showing is inadequate.[3]

[1] In order to satisfy the provisions of 28 U.S.C. § 2254 a state prisoner normally would do one of the following: (1) Allege in his petition that the claim urged in the Federal Court was determined at his criminal trial and asserted as reversible error in his application for writ of error; or (2) allege that, the time for direct appeal from his conviction has passed, he has unsuccessfully petitioned the appropriate State circuit court for a writ of habeas corpus on the same grounds urged in this Court and that he thereafter filed a timely application to the Supreme Court of Appeals of West Virginia for a writ of error to review the circuit court's denial; or (3) allege that he has followed neither (1) nor (2) because it is obvious that the State courts will not now entertain such a claim. To satisfy this Court's requirements under the last alternative the petition should fully explain why further State court proceedings would be ineffectual, and, if possible, cite legal authority substantiating this belief.

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2. "The petition shall show that the question which petitioner attempts to raise in this court was submitted to the State Courts, by exhibiting a copy of any petition submitted to the State Courts, together with a copy of the final order of the West Virginia Supreme Court of Appeals, denying the petition, or affirming the lower court's denial of such petition." Order of United States District Court for the Northern District of West Virginia (entered January 20, 1965).

3. Any petition for habeas corpus merely filed or lodged with this Court at this time and on which the Court has taken no further action before the date of this opinion, such as summarily dismissing on the merits, ordering the respondent to show cause, or setting a date for hearing, will be dealt with according to the rules set forth herein. Any habeas corpus case that has reached the status of an order to show cause hearing or appeal, will be treated under the former rules of this Court.

The "exhaustion" rule enunciated today is based on the dictates of the Supreme Court as well as a recognition of the necessity and desirability of preserving harmonious relations between Federal and State judiciaries. However, in attempting to conciliate our dual systems the Court does not overlook the rights of the individual which the Ancient Writ is vouchsafed to protect. On the contrary, it is the belief of this Court that the principles announced here will provide speedier and more efficient adjudication of prisoners' claims, and at the same time effectuate the desire of the Congress and the Federal judiciary to place the adjudication of Federal rights of State prisoners in the proper forum—the State courts.

I. State prisoners and Federal rights.

In recent years the United States Supreme Court has handed down several opinions which have had substantial impact on the States' administration of criminal justice.[4] These decisions have broadened the scope of federally guaranteed rights accorded state criminal defendants, and also have made these rights more meaningful by providing a more expansive Federal remedy.

That expanded remedy is Federal habeas corpus. As interpreted by two cases, Fay v. Noia[5] and Townsend v. Sain[6], Federal habeas corpus relief is no longer fettered by procedural pitfalls which often foreclosed relief without a decision on the merits.

[2] These two decisions are clear pronouncements of the final arbiter of Federal law and therefore controlling on any court of the Nation.[7] They clearly state the function, scope and

4. Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (extending the right to confrontation to state criminal dedendants); Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) (right to counsel after arrest); Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (privilege against self incrimination); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel at trial absolute); Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (right to counsel on direct appeal); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (right to transcript on appeal).
5. 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).
6. 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).
7. United States Constitution, Article VI.

intent of Federal habeas corpus and in doing so lay to rest many disputes that have arisen since the passage of that statute in 1867.[8]

A most important aspect of the Noia holding is the majority's lengthy discussion of the function of the writ of habeas corpus in the Federal courts. Formerly, there was much authority to support a contention that at common law habeas corpus was "* * * restricted * * * to a review of the face of the record to determine whether it established the jurisdiction of the convicting court over the subject matter of the action and over the person of the defendant, and whether the Court had authority to render its judgment."[9] Under this restrictive view a finding that the convicting court had general jurisdiction and the defendant had appeared before it was dispositive of the petition, even if the record also made it clear that irregularities of constitutional magnitude existed. "Constitutional denials were not examined, since even if present they would not invalidate the convicting court's jurisdiction, but would simply be deemed an irregularity in the trial court proceedings."[10]

The majority in Noia rejected this "jurisdictional" view in favor of the contention that habeas corpus had always been available to correct gross injustice whether it arose from the convicting court's lack of jurisdiction over the subject matter or prejudicial and unfair activity by the State in gaining a conviction.

Noia held Federal habeas corpus will lie to attack any State imprisonment, based upon a judgment obtained through the denial of a right guaranteed by the Fourteenth Amendment. Justice Brennan's majority opinion in Noia discredits the "jurisdictional" approach to the availability of Federal habeas corpus. The majority opinion sets forth exhaustive legal and historical arguments to show: (1) that the Great Writ has always been available for any imprisonment in contravention of basic concepts of justice; (2) that the belief that habeas corpus would only issue to discharge a prisoner when the sentencing court was

8. Judiciary Act of February 5, 1867, c. 28, § 1; 14 Stat. 385-386.
9. Note, State Post Conviction Remedies & Federal Habeas Corpus, 40 N.Y.U.L.Rev. 154, 158 (1965).
10. Id. at 158-159.

without general jurisdiction arose years ago through a mistaken equation of "jurisdiction" and basic justice.[11] In fact, most early cases using "jurisdictional" language were also based on denial of basic justice. Since the concept of basic justice has grown to encompass many individual rights while the meaning of "jurisdiction" has remained relatively unchanged, the use of lack of "jurisdiction" as the sole basis for invoking the powers of the Writ is now totally inadequate and incorrect.[12]

The Noia opinion also rejected the theory that a showing by the State that the habeas corpus applicant did not appeal his conviction, or had otherwise failed to urge his constitutional claim by way of some state remedy no longer open to him, was an unrebuttable showing of waiver or that this failure was an "adequate and independent" state ground which precluded any decision on the constitutional question in a Federal habeas corpus case. This was done by holding that waiver of a Federal right would only be found according to the Federal standard[13] and

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11. "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." Fay v. Noia, 372 U.S. at 401-402, 83 S.Ct. at 828-829 (Brennan, J.).

12. "Of course standards of due process have evolved over the centuries. But the nature and purpose of habeas corpus have remained constant. History refutes the notion that until recently the writ was available only in a very narrow class of lawless imprisonments." Id. at 402-403, 83 S.Ct. at 829. "Nor is it true that a common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court." Id. at 404, 83 S.Ct. at 830.

13. "* * * the Court ruled that, since waiver of a federal claim is a federal question, a state court's finding of waiver will not automatically bar independent federal examination. Then the Court enunciated a federal waiver standard adopted principally from the Johnson v. Zerbst [304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461] 'knowing and intelligent' formulation and presenting a clear contrast with the traditional state formulations. Conventional notions of waiver and finality of judgment, felt the Court, obstruct adequate vindication of federal rights * * *. The Court implied that a decision made by petitioner's counsel, without consulting his client, will not be considered 'an intentional relinquishment * * * of a known right or privilege' rather a waiver 'depends on a considered choice of the defendant.'". Note, State Post-Conviction Remedies & Federal Habeas Corpus, 40 N.Y.U.L.Rev. 154, 156-57 (1965).

that the doctrine of "adequate and independent" State grounds applied only to direct appellate review of State cases and not to a wholly separate and collateral proceeding, such as Federal habeas corpus.[14]

While Fay v. Noia destroyed these restrictive concepts, Townsend v. Sain, decided the same day, pointed the way for Federal and State courts to satisfactorily determine claims of constitutional deprivation made on collateral attack. Townsend makes it mandatory upon a Federal district court to try the constitutional issues anew whenever a proper claim is made and the petitioner had not received full and fair consideration of that claim in the State courts.[15] This command necessitates a Federal hearing on the merits whenever the petitioner's claim, if true, would entitle him to relief and the record developed in the State court does not fairly support a determination that the claim is untrue or that the right had been waived according to the Federal standard.[16]

II. The Federalism Problem.

The immediate aftermath of Noia and Townsend was chaotic, bringing a tidal wave of habeas corpus petitions from state prisoners into the Federal district courts, flooding their dockets and taxing their facilities to the utmost. Eminent State jurists and legal commentators deplored the invasion into the prerogatives

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The decision in Henry v. State of Mississippi, 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed.2d 408 (1965) casts doubt upon the necessity of the defendant to participate fully in every tactical decision of trial counsel. Thereby, perhaps, diluting the stringent waiver standards suggested in Noia.

14. "* * * the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." Fay v. Noia, 372 U.S. 391, 399, 83 S.Ct. 822, 827, 9 L.Ed.2d 837.

15. "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." Townsend v. Sain, 372 U.S. 293, 312-313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

16. Id. at 316, 83 S.Ct. at 759.

of State criminal justice.[17] Legislation designed to curtail Federal habeas corpus jurisdiction has been presented to the Congress and legal associations have endorsed resolutions to take the teeth from the broadened concepts announced by the Court.[18] Some state prisoners are actually released through Federal habeas corpus. However, most successful petitioners, representing only a small percentage of those who seek this relief, are remanded to the State for a new trial or the perfection of an appeal. Only in cases in which retrial is impossible, or, if granted, results in acquittal, is release secured. This decision usually rests upon the State, not the Federal government.

Nevertheless, respected sources have urged that State criminal proceedings are primarily a matter of State concern, and as such, State judgments affirmed by the appellate Court should not be summarily struck down by Federal trial judges.[19] It is conceded that this has certain validity. This Court recognizes the problems these cases have caused in Federal-State relations. The Supreme Court and the Fourth Circuit Court of Appeals have also acknowledged these problems.[20] Those Courts have pointed the way for the District Courts to deal with the situation. The seeds for this solution were sown by the Supreme Court many years ago, and specifically approved by Congress in 1948.[21] Their germination and fruition have been slow and the harvest among the states has been piecemeal. With the benefit of the guiding hand of the Supreme Court the solution is obvious. It involves neither minimization of the principles set forth in Noia and Townsend, nor hedging from the mandates of those decisions. Rather it involves principles that the Court and Congress have long accepted and that federalism demands. Stated simply, this solution recognizes the desirability of State determination of claims made by its prisoners before any judicial intervention is

17. E. g., Desmond, Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform, 9 Utah L.Rev. 18 (1964).

18. See H.R. 1835, 88th Cong., 2d Sess. (1964). See also H.R.Rept. No. 1384, 88th Cong., 2d Sess. (1964); 110 Cong. Rec. 14678-14684 (1964).

19. See Desmond, 9 Utah L.Rev. 18 (1964).

20. "The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between federal and state judiciaries." Henry v. State of Mississippi, 379 U.S. 443, at 453, 85 S.Ct. 564, at 571, 13 L. Ed.2d 408 (1965) (Brennan, J.). See Hunt v. Warden, 335 F.2d 936 (4 Cir. 1964).

21. 28 U.S.C. § 2254.

allowed through Federal habeas corpus. It also holds with the theory that the states, if given an opportunity, will fully protect the Federal constitutional rights guaranteed defendants in their court system. A further reading of Townsend, especially in light of several later cases, reaffirms the Federal policy favoring primary State determination. To be sure, it is not an abdication of the office of protector of Federal rights to State courts, but a recognition of State interest in, and ability to administer, its own system of criminal justice. Federal habeas corpus would largely become a vestigal remedy if the states seize the initiative, as encouraged by Federal courts, and provide adequate state remedies.

III. The Solution: Exhaustion and Federal Policy.

The solution thus far alluded to is that the states grant full and fair evidentiary hearings, in the first instance, to determine the validity of any prisoner's constitutional claim. Once a full and fair hearing on the constitutional claim is granted by a State court, Federal courts have it within their discretion to deny a trial of the facts anew.[22] In most such instances the Federal court will need to do nothing more than review the record made in the State court before disposing of the case.[23] If the hearing meets certain standards and is transcribed[24] the "historical facts" determined by the State judge may be accepted by the Federal court. Only the determination of "ultimate facts" need be arrived at independently by the Federal court, and this ordinarily can be done from the record. This, of course, means that generally the Federal court will review the record only to determine whether a fair hearing was held and whether the conclusions of law are supported by sufficient facts. Findings of credibility and the like made by the State court will usually be accepted by the Federal court.

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22. "If he (the federal habeas judge) concludes that the habeas applicant was afforded a full and fair (evidentiary) hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing." Townsend v. Sain, 372 U.S. 293, at 318, 83 S.Ct. 745, at 760, 9 L.Ed.2d 770.
23. See Meador, Accommodating State Criminal Procedure and Federal Post-Conviction Review, 50 A.B.A.J. 928 (1964). See generally 33 F.R.D. 365-505 (1964).
24. Those standards are set out in detail by the Court in Townsend v. Sain, 372 U.S. at 313-319, 83 S.Ct. at 757-760. See Note, 40 N.Y.U.L.Rev. 154, 175-187.

[3] The implementation of this form of Federal abstention in favor of prior State court determination of the facts is made possible by 28 U.S.C. § 2254. Called the "exhaustion doctrine" it was judicially created many years ago in Ex parte Royall[25] and codified in 1948. It is not a jurisdictional rule, but rather is grounded on the principles of comity.[26] As a rule of courtesy it must be administered according to the philosophic reasons for its *esse* and not by mechanical principles. Moreover, because it deals with the exhaustion of state remedies it must be applied only after thorough consideration of the peculiar practices and remedies available in the particular state.

Therefore, the purposes of the rule, its underlying philosophy and rationale should be explored and applied to the peculiar situation in West Virginia in order to ascertain what State remedies should be sought before the requirements of exhaustion are met.

In recent years it has become clear that the main policy behind the "exhaustion doctrine" is to encourage and permit a state court hearing on the merits of the constitutional claim before permitting the Federal courts to accept jurisdiction of the case. Courts have emphasized that a state prisoner need not go through meaningless rituals in the State courts before seeking a Federal forum.[27] In several cases in which the state prisoner had previously, but unsuccessfully, availed himself of the State's post-conviction remedies, without a hearing on the merits, Federal courts have refused to exercise habeas courpus jurisdiction because an intervening State statute or judicial decision indicated that a new application for State relief would be considered on

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25. 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886).

26. "It is today unquestioned that the exhaustion provision 'is not one defining power but one which relates to the appropriate exercise of power.'" Sokol, Federal Habeas Corpus, at 113, citing and quoting from Bowen v. Johnston, 306 U.S. 19, 27, 59 S.Ct. 442, 83 L.Ed. 455. This theory is supported by cases in which federal jurisdiction was held proper even though the habeas applicant had not fulfilled the exact requirements of exhaustion, because "* * * to send * * * (petitioner) back to the State court * * * would be to follow the letter but ignore the spirit of § 2254." Thomas v. Cunningham, 335 F.2d 67, 69-70 (4 Cir. 1964).

27. Evans v. Cunningham, 335 F.2d 491 (4 Cir. 1964).

the merits.[28] This Court's former practice of finding exhaustion after a petition to the West Virginia Supreme Court of Appeals for writ of habeas corpus was based on a literal reading of Grundler v. State of North Carolina, 283 F.2d 798, 800 (4th Cir. 1960):

> If a question is presented and adjudicated by the state's high court once, it is not necessary to urge it upon them a second time under an alternate procedure.

If the Court were to apply the doctrine of "exhaustion" mechanically this language would be sufficient precedent to hold that petitioner's actions in the case at bar were sufficient to meet the requirements of exhaustion. However, this Court's interpretation of West Virginia law coupled with Federal policy favoring State hearings compels re-examination of the former rule. This Court finds that a mechanical application of the rule announced in Grundler is not applicable to the instant case.

The Federal policy favoring State court determination of the relevant facts in cases involving constitutional claims by state prisoners, first announced in Townsend, was reaffirmed in less subtle tones in four cases during the 1964 term.[29] Of the four, Case v. State of Nebraska is the most explicit. That case involved a State court denial of habeas corpus on the grounds that although the petition had stated a Federal constitutional claim,

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28. United States ex rel. Wynn v. Wilkins, 342 F.2d 777 (2d Cir. 1965) (where state courts have fashioned a new judicial remedy to permit factual determination on voluntariness of confessions in view of recent Supreme Court case state prisoner must go back to state court and avail himself of that remedy even though it was not open to him when he was denied a determination on the merits by the state court previously); Blair v. People of State of California, 340 F.2d 741 (9 Cir., 1965) (when state habeas claim of denial of counsel on appeal was dismissed before the Supreme Court decision in Douglas v. People of State of California the state prisoner must go back into state court to allow the state to consider the case in light of Douglas); Dabney v. Sigler, 345 F.2d 710 (8th Cir., 1965) (held no exhaustion where it appears that the State of Nebraska has recently passed a statute under which this state prisoner could be heard on his constitutional claim even though such a state determination had earlier been applied for and denied); United States ex rel. Bagley v. LaVallee, 332 F.2d 890 (2d Cir., 1964); Hunt v. Warden, 335 F.2d 936 (4th Cir., 1964).

29. Case v. State of Nebraska, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965); Henry v. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Boles v. Stevenson, 379 U.S. 43, 85 S.Ct. 174, 13 L.Ed.2d 109 (1964).

the State of Nebraska had no procedure, either by its limited habeas corpus or any other remedy, to entertain such claims. Certiorari was granted to test whether the State had an obligation to provide such a remedy.[30] After briefs had been submitted, but before oral argument, the Nebraska Legislature passed a post conviction statute under which petitioner could have his claim heard.[31] This legislative intervention enabled the Court to avoid the constitutional issue and vacate and remand in light of the supervening statute.[32] Justices Clark and Brennan, in separate concurring opinions, however, indicated that the States might well have a constitutional duty to provide some post-conviction remedy for the airing of Federal claims.[33] Aside from the constitutional question both Justices applauded the actions of the Nebraska Legislature in accepting the invitation of the Federal courts to settle Federal claims:

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30. "We granted certiorari * * * to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Case v. State of Nebraska, 381 U.S. 336, at 337, 85 S.Ct. 1486, at 1487 (per curiam).

31. Neb. Leg. Bill 836, 75th Session, effective April 12, 1965.

32. Cf. Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

33. This Court attempts to make no decision on the merits of the issue presented but not decided in Case v. State of Nebraska. It is, of course, a problem that may well have to be met squarely in the future. There are a number of Supreme Court cases indicating that such a duty exists. "The Due Process Clause of the Fourteenth Amendment does require still further protection (after trial and appeal). A state must furnish corrective process to enable a convicted person, even after such proceedings I have outlined to established in fact a sentence was procured under circumstances which offend 'the fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Taylor v. State of Alabama, 335 U.S. 252, 272 168 S.Ct. 1415, 1424, 92 L.Ed. 1935 (Frankfurter, J., concurring) (citations omitted). For a brief outline of the argument made for petitioner in the Case case see 381 U.S. at 343, Note 5, 85 S.Ct. at 1490. See Note, Effect of Federal Constitution in Requiring State Post Conviction Remedies, 53 Colum. L.Rev. 1143 (1953). Although it is very possible that such a duty does exist the Court has been reluctant to actually enforce it and instead has either assumed that adequate corrective process did exist within the state or instructed the prisoner to make use of the federal forum. As recently as the Townsend opinion the Court refused to force the issue. "In announcing this test we do not mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such standards are governed to a large extent by state law. (However) * * * the existence of the exhaustion of state remedies requirement * * * lends support to the view that a federal hearing is not always required. It presupposes that the State's adjudication of the constitutional issue can be of aid to the federal court sitting in habeas corpus." 372 U.S., at 313, note 9, 83 S.Ct., at 1487.

> The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well. If, by effective processes, the States assumed this burden, the exhaustion requirements of 28 U.S.C. § 2254 (1958 ed.) would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further. See Townsend v. Sain, 372 U.S. 293, 312-318, 83 S.Ct. 745, 9 L.Ed.2d 770. Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of Townsend v. Sain were met, prove unnecessary. (Footnotes omitted).[34]

The main thrust of arguments encouraging effective State postconviction remedies is that a constitutional claim having been alleged, the petitioner will get a hearing on the merits somewhere along the line, and logically that hearing should be held in the State courts.

[4, 5] This, coupled with the language in Case, the majority opinion in Townsend and the holdings in Henry v. State of Mississippi[35] and Jackson v. Denno[36] leads to the inescapable

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34. Case v. State of Nebraska, 381 U.S. 336, at 344-345, 85 S.Ct. 1486, at 1757, 14 L.Ed.2d 422.

35. 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408, (1965). That case, a direct review of a state criminal conviction, was vacated and remanded to the state court for a *state hearing* to determine whether or not there was intelligent waiver of a constitutional objection to the admissibility of certain evidence seized without a warrant. The interesting thing to note here is that the State court had already held that intelligent waiver existed and the state had no procedure for holding such a post

conclusion that the Federal policy concerning "exhaustion" is to encourage and promote State court evidentiary hearings on Federal claims. It therefore follows that the requirements of "exhaustion" have not been met if a state prisoner still has available a State forum in which he can receive an evidentiary hearing. The Court reiterates that "exhaustion" is based on comity and is an effort to promote harmonious Federal-State relations. That, along with the explicit Federal policy announced by the Supreme Court encouraging State hearings, is more than enough to convince this Court that if a West Virginia prisoner is to qualify for Federal habeas corpus relief he must first pursue the proper available State remedy providing for a full evidentiary hearing.

IV. Postconviction Relief in West Virginia.

Traditionally State common law remedies such as habeas corpus and coram nobis have been very narrow in scope.[37] Concepts of automatic waiver and "jurisdiction," such as those disapproved in Fay v. Noia, have often forced State courts to deny consideration on the merits of claims cognizable by Federal habeas corpus[38] Even when those problems have been met, outmoded notions of the conclusiveness of records and burden of proof, held untenable in Townsend v. Sain, have been invoked to dismiss petitions otherwise stating a ground for relief.[39]

existing state court remedies and the historical reasons involved.

Nevertheless, many states have met the challenge, albeit in various ways. A good example of the methods open to the states

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trial hearing of evidence on the question as the case then stood. Nevertheless, the majority urged that such a hearing he held because determination of the facts in the state court was more desirable than a federal habeas corpus hearing.

36. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 was a federal habeas corpus case in which the Court held that the voluntariness of confessions must first be determined by the judge out of the hearing of the jury. There the Court remanded the case to the state court for a hearing to determine the voluntariness claim even though no such hearing was provided for under New York law. It is interesting to note that the New York Court of Appeals fashioned a judicial remedy to make such hearings possible. See United States ex rel. Wynn v. Wilkins, 342 F.2d 777 (2d Cir. 1965). See also Boles v. Stevenson, 379 U.S. 43, 85 S.Ct. 174, 13 L.Ed.2d 109 (1964).

37. See Note, 40 N.Y.U.L.Rev. 154 (1965) for an excellent treatment of

38. Ibid.

39. Ibid.

in adopting a remedy coextensive with Federal habeas corpus is found in a survey of the law in three sister states which border West Virginia. Maryland has adopted a Post Conviction statute[40] similar to the Uniform Post Conviction Act.[41] Kentucky has enacted, by Rule of Court[42], a remedy much like that used for collateral attack of Federal convictions. Virginia, by a series of judicial pronouncements, has broadened the scope of state habeas corpus to cover Federal constitutional claims.[43] Gradually many states, by case law or statute, have cast aside outmoded obstacles such as automatic waiver and the conclusiveness of records, to provide a meaningful forum for Federal claims.[44]

West Virginia has not enacted specific postconviction legislation to meet the exigencies of complete collateral review. A survey of the case law in the State, however, leads this Court to the conclusion that West Virginia possesses a judicially shaped common law remedy very closely resembling Federal habeas corpus, which, if properly invoked by state prisoners, would provide for full and fair evidentiary hearings and appellate review in determining the merits of constitutional claims.

It appears that both coram nobis and habeas corpus exist in West Virginia. The privilege of the writ of habeas is guaranteed

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40. Md. Code Ann. Art. 27, §§ 645A-645J (1964) Cum. Supp.).

41. 9B Uniform Laws Ann. 352-359.

42. Ky.R.Cr. 11.42. Compare 28 U.S.C. § 2255.

43. See Griffin v. Cunningham, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964).

44. Thirteen states have adopted some type of post conviction relief statute. Alaska, R.Crim.P. Rule 35(b); Delaware, Del. Super.Ct.Crim. Proc. Rule 35(a); Florida, Fla.Rules Crim.Proc. 1, F.S.A. ch. 924 Appendix; Illinois, Ill.Rev.Stat., c. 38, §§ 122-1 to 122-7; Kentucky, Ky.Rules Crim.Proc. 11.42; Maine, Me.Rev.Stat. Ann., c. 126, §§ 1-A to 1-G (Supp. 1963); Maryland, Md.Code Ann., Art. 27, §§ 645A to 645J (Supp.1964); Missouri, Mo.Sup.Ct. Rule 27.26, V.A.M.R.; Nebraska, Neb. Leg. Bill 836, 75th Sess., effective April 12, 1965; New Jersey, N.J.Crim. Prac. Rules of Super. and County Cts., Rule 3:10A-2; North Carolina, N.C.Gen.Stat. §§ 15-217 to 15-222 (Supp.1963); Oregon, Ore.Rev.Stat. §§ 138.510-138.680 (1963); Wyoming, Wyo. Stat.Ann. §§ 7-408.1 to 7-408.8 (1963 Cum.Supp.).

The post conviction remedy afforded by these various rules of court and statutes differ. However, in the main, they seem to be the best method for guaranteeing a state remedy coextensive to federal habeas corpus. For an excellent survey of the variations involved in these remedies and a critique of them from the point of view that they somehow fail to encompass the same remedy provided by federal habeas corpus, see Note, 40 N.Y.U.L.Rev. 154 (1965).

by the State Constitution[45], while the writ of error coram nobis has been preserved by statute to correct errors of fact.[46] Apparently, however, coram nobis has not been used by criminal defendants.[47] This is consistent with the narrow scope of that writ in most American jurisdictions.[48]

Petition for a writ of habeas corpus is the accepted postconviction remedy. The State Constitution and statutes grant original jurisdiction in habeas corpus cases to both the Supreme Court of Appeals[49] and the circuit courts.[50] In addition, the Supreme Court of Appeals has appellate jurisdiction to review, by writ of error, the disposition of any habeas corpus case by a circuit court.[51]

[6] Admittedly this Court is unable to state categorically, that, in West Virginia, habeas corpus will lie to test any conviction gained through a deprivation of Federal constitutional rights. The State high court has recently said in dictum that habeas corpus was available to attack any judgment which was wholly or partially void for lack of jurisdiction.[52] From this it could be reasoned that the State courts are still employing the old "jurisdictional" approach to habeas corpus. However, a survey of recent habeas corpus cases does not confirm this view. Relief has been granted to prisoners claiming specific constitutional denials such as the lack of counsel[53] at trial and denial of a transcript for purposes of appeal.[54] Moreover, the West Virginia

45. W.Va.Const., Art. 3, § 4.

46. W.Va.Code Ann., § 5756 (1961 ed.). Although the recently enacted West Virginia Rules of Civil Procedure abolish the writs of error coram nobis and coram vobis, Rule 60(b), it is doubtful that those writs have been abolished insofar as they could be used to attack a criminal conviction. Petitions for these writs do not become separate and collateral civil cases such as habeas corpus. They attach to the former case and become a continuing part thereof. See United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954). Therefore, the abolition of these writs in civil cases probably does not apply to their use in criminal cases.

47. See Carlin, Correction of Error on Motion, 55 W.Va.L.Rev. 1 (1952).

48. See Note, 40 N.Y.U.L.Rev. 154 (1965).

49. W.Va.Const., Art. 8, § 3; W.Va.Code Ann. § 5324 (1961 ed.).

50. W.Va.Const., Art. 8, § 12; W.Va.Code Ann. § 5196 (1961 ed.).

51. W.Va. Code Ann., § 5787 (1961 ed.).

52. See State ex rel. Massey v. Boles, 140 S.E.2d 608, at 610 (W.Va., 1965).

53. State ex rel. May v. Boles, 139 S.E.2d 177 (W.Va. 1964).

54. State ex rel. Banach v. Boles, 147 W.Va. 850, 131 S.E.2d 722 (1963).

Supreme Court of Appeals has adopted the Federal waiver standard in habeas corpus cases.[55] Although the Court can point to no case which specifically holds that State habeas corpus will lie to test *any* constitutional denial, the holdings already alluded to and the general tenor of recent opinions, both in West Virginia and other states, lend conclusive support to an assumption that this is the law.[56] Without a clearcut holding to the contrary,

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55. State ex rel. May v. Boles, 139 S.E.2d 177 (W.Va. 1964).

56. That this is the position of the West Virginia court is strongly suggested in State ex rel. Banach v. Boles, 131 S.E. 2d 722, at 728-729: "Petitioner is presently confined as a result of the wrongful act of the state in denying him the rights guaranteed to him by the Fourteenth Amendment of the Constitution of the United States * * * there being no other method by which to secure to petitioner a vindication of his rights, he is entitled to be discharged upon the writ of habeas corpus heretofore awarded." Several states have broadened the scope of the habeas corpus relief by merely expanding the concept of jurisdiction to allow many constitutional claims to be labeled "jurisdictional" claims. See e.g. Wojculewicz v. Cummings, 145 Conn. 11, 138 A.2d 512, cert. den., 356 U.S. 969, 78 S.Ct. 1010, 2 L.Ed.2d 1075 (1958); Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. den., Johnson v. New Mexico, 375 U.S. 855, 84 S.Ct. 117, 11 L.Ed.2d 82 (1963); Ex parte Story, 88 Okl.Cr. 358, 203 P.2d 474 (1949); Commonwealth ex rel. Sleighter v. Banmiller, 392 Pa. 133, 139 A.2d 918 (1958); State ex rel. Doxtater v. Murphy, 248 Wis. 593, 22 N.W.2d 685 (1946). Other state courts have completely discarded the jurisdictional approach as a fiction and held that state habeas would lie for constitutional claims. E.g. In re Winchester, 53 Cal.2d 528, 2 Cal.Rptr. 296, 348 P.2d 904, cert. den., 363 U.S. 852, 80 S.Ct. 1631, 4 L.Ed.2d 1734 (1960); Rice v. Davis, 366 S.W.2d 153 (Ky.1963).

It would seem that Justice Holmes' statement concerning habeas corpus would justify either approach as long as the end result met what he thought to be the essence of the writ of habeas corpus. "* * * habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.

"The argument for the appellee in substance is that the trial was in a court of competent jurisdiction * * * But * * * (w)hatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial * * * We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case. *The loss of jurisdiction is not general, but particular, and proceeds from the control of a hostile influence.*" Frank v. Mangum, 237 U.S. 309, 346-347, 35 S.Ct. 582, 595, 59 L.Ed. 969 (Holmes, J., dissenting) (Emphasis added.)

See 67 W.Va.L.Rev. 234 (1965): "The West Virginia court has awarded habeas corpus relief on the basis of two federal constitutional grounds * * * This provided a significant broadening of the rather limited reach of the traditional state habaes corpus remedy. There appears to be

Federal courts will presume that the desirable corrective process referred to here is provided by the State.[57]

Armed with this assumption, the Court surveys the law of West Virginia habeas corpus in determining the manner best suited to invoke this remedy, and at the same time satisfy Federal "exhaustion" requirements regarding evidentiary hearings in the State court.

Although both the West Virginia Supreme Court of Appeals and the circuit courts have original jurisdiction in State habeas corpus, the treatment accorded such a petition in the two forums differs because of the nature of the two courts. The circuit court, a trial court of general jurisdiction, can summon witnesses and hold full evidentiary hearings.[58] In cases brought at this level the return of the respondent is not conclusive of the facts. Hearings to determine facts beyond the return and petition are encouraged in the circuit court.[59] On the other hand, the Supreme Court of Appeals does not appear to have the facilities to hold evidentiary hearings on original writs addressed to it. Only when the record is clear, or when there is a stipulation of

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nothing to prevent the court from awarding state habeas corpus relief on the basis of a violation of constitutional rights * * * If May and Banach actually represent a crack in the door, as they appear to, state habeas corpus relief conceivably could be opened to all constitutional objections which may now be advanced in federal courts." Id. at 239.

57. See e.g., Young v. Ragen, 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949).

58. W.Va.Code, §§ 5325, 5329, 5330 (1961 ed.). The latter is particularly in point. "The court or judge before whom the petitioner is brought, after hearing the matter both upon the return and any other evidence, shall either discharge or remand him, or admit him to bail, as may be proper * * *"

The impact of this statute on the function of the Great Writ in West Virginia is ably expressed in Hurley v. Hurley, 71 W.Va. 269, 76 S.E. 438 (1912), where the court stated: "At common law the return in habeas corpus was conclusive; there was no call for issue and trial of fact. Church on Habeas Corpus (2d Ed.) sec. 149. By statute, habeas corpus has been liberalized. 'In this State the court is not precluded by the return from inquiring into the truth of the matters therein alleged.' State ex rel. Neider v. Reuff, 29 W.Va. 751, 2 S.E. 801, 6 Am.St.Rep. 676. 'The statute provides for trial of fact beyond the return. The court or judge may hear 'the matter both upon the return and any other evidence.' Code 1906, ch. 111, sec. 6." Id., 76 S.E. at 439.

59. See text of note 58 and Wright v. Wright, 78 W.Va. 57, 88 S.E. 606 (1916).

facts, has that Court seen fit to grant relief.[60] This is understandable since that Court cannot be expected to grant relief in cases in which important facts remain unresolved. However, the Supreme Court of Appeals has discretionary power to transfer the case to a proper court for hearing.[61]

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60. This is not true in deniel of counsel claims. When the record is silent as to waiver of counsel the Supreme Court of Appeals has followed the federal waiver standard set forth in Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70 (1962) and found that no waiver existed or could be presumed from a silent record. See State ex rel. May v. Boles, 139 S.E.2d 177 (W.Va.1964).

61. W.Va.Code Ann., § 5325 (1961 ed.), states inter alia: "If the writ be ordered by the Supreme Court of Appeals or a judge thereof, it may be made returnable either before such court *or before a proper court or judge of the county wherein the petitioner is detained.*" (Emphasis added).

A literal reading of the West Virginia statute providing for transfer of the case by the Supreme Court of Appeals to "* * * a proper court or judge of the county wherein the petitioner is detained." (W.Va.Code, § 5325 1961 ed.), appears on its face to deny the Supreme Court of Appeals any discretion in choosing the forum to which it can transfer the case. The statute in its present form was drafted to conform with the decision in Click v. Click, 98 W.Va. 419, 127 S.E. 194 (1925). That case held only that an original writ of habeas corpus petition addressed to a circuit court could not be made returnable to that circuit court unless the person was being illegally detained within the territorial boundaries of that circuit court's jurisdiction. That opinion is based upon the sound theory that allowing prisoners to file and have a hearing in every circuit court of the state, no matter where they were convicted, or incarcerated, would lead to confusion and abuse of the writ. The court found that the statute, as it then existed, could be interpreted to give a circuit court, other than the one in the county of incarceration, jurisdiction to hear a habeas corpus case. It rejected that interpretation, however, on a sound theory of construction. However, this Court is not thoroughly convinced that the same principle need apply to the jurisdiction of the most convenient circuit court when that court is directed by the Supreme Court of Appeals to hear the evidence and determine the merits of a petition for habeas corpus originally submitted to the Supreme Court of Appeals and transferred according to Code § 5325. In this situation the policy against allowing a hearing in a cirucit court other than the one having general jurisdiction over the place where the petitioner is being detained does not exist. There could be no abuse of the writ because the Supreme Court of Appeals itself would designate the most convenient forum for hearing, thereby taking away the possibility of petitioner choosing the forum and filing the same petition in several different circuits. This Court, of course, expresses no opinion concerning how the Supreme Court of Appeals will interpret the statute providing for transfer. It should be noted, however, that there appear to be no reported decisions dealing with the Supreme Court of Appeal's invocation of the discretionary power granted under the statute. Moreover, it also appears as a matter of practice that the Supreme Court of Appeals has not exercised its power under the aforementioned statute. It is submitted that any statutory change in post conviction relief possibly give consideration to allowing either transfer to the convicting court by the Supreme Court of Appeals or original filing of petitions in the convicting forum. Either or both modifications might do much to facilitate the implementation of a modernized system of post conviction review.

It is therefore clear to this Court that a full and fair evidentiary hearing to determine the merits of a constitutional claim will be afforded any West Virginia prisoner who seeks postconviction relief in the proper circuit court. Original applications for the writ in the Supreme Court of Appeals can only result in evidentiary hearings if that court exercises its discretion to make the writ returnable to the proper circuit court. There is no legal compulsion upon the Supreme Court of Appeals to follow this transfer procedure. As a practical matter the circuit court is the forum to petition in order to get a full State court evidentiary hearing.

[7] In view of the Federal policy and this Court's understanding of West Virginia law, the Court concludes that all applications for Federal habeas corpus involving the determination of disputed facts must affirmatively state that the petitioner has previously sought resolution of the factual controversy in a proper State forum and thereafter sought appellate review of an adverse determination on this claim before his Federal petition will be entertained on the merits. Failure of such a showing will result in dismissal for failure to exhaust available State remedies.

V. Conclusion.

[8] For the foregoing reasons the petition of Jack M. Miller is dismissed. Miller has alleged constitutional deprivations which have been denied by the respondent in answer to an order to show cause. The respondent's answer puts Miller's contentions of fact in issue. Once an issue of fact arises it usually must be resolved by an evidentiary hearing. Since Miller has not sought habeas corpus relief in the State circuit where he is incarcerated he has not given the State a fair chance to determine the factual issues in his case. There being a proper forum for factual determination in the State court system, the Court finds that Miller has failed to exhaust available State remedies according to the principles set forth herein.

The petition will therefore be ordered dismissed.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

STANLEY SHEFTIC,
Petitioner

vs. Civil Action File No. 571-E

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
Respondent

ORDER

This day the Court, having further considered the petition for writ of habeas corpus filed herein and the respondent's answer thereto, is of the opinion, for the reasons set forth in a written Memorandum filed in the case of Jack M. Miller vs. Otto C. Boles, Warden, Civil Action File No. 468-E, dated November 23, 1965, a copy of which is ordered filed and made a part of the record in this case, that the petitioner is not entitled to the writ and the relief prayed for, and it is

ORDERED that the prayer of the petition be, and the same is refused, and this case be, and the same is, dismissed and dropped from the docket of this court.

ENTER: January 12, 1966.

ROBERT E. MAXWELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

JOHN HOWARD RUNYON, JR.
Petitioner,

vs. Civil Action File No. 597-E

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
Respondent

ORDER

This day the Court, having further considered the petition for writ of habeas corpus filed herein and the respondent's answer thereto, is of the opinion, for the reasons set forth in a written Memorandum filed in the case of Jack M. Miller vs. Otto C. Boles, Warden, Civil Action File No. 468-E, dated November 23, 1965, a copy of which is ordered filed and made a part of the record in this case, that the petitioner is not entitled to the writ and the relief prayed for, and it is

ORDERED that the prayer of the petition be, and the same is refused, and this case be, and the same is, dismissed and dropped from the docket of this court.

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ROBERT E. MAXWELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

JOHN HOWARD RUNYON, JR.,
Petitioner,

v. Civil Action File No. 597-E

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
Respondent

MEMORANDUM

John Howard Runyon, Jr., is now in the custody of the Respondent, serving an indeterminate sentence of not less than one nor more than ten years, imposed on July 24, 1961, by the Circuit Court of Wayne County, West Virginia. This sentence was imposed when Runyon withdrew his previous *not guilty* plea on an indictment charging breaking and entering, and offered a plea of *guilty* to entering without breaking. Runyon offered this guilty plea during the course of his state trial, after the state had introduced a part of its evidence related to the breaking and entering charge.

In his recent petition for Federal habeas corpus relief, dated December 8, 1965, Runyon's only contention was that he was denied effective representation by court appointed counsel in the state trial court. On January 12, 1966, his petition was ordered dismissed by this Court, for reasons stated in a written memorandum filed in the case of Miller v. Boles, 248 F. Supp. 49 (1965). By letter dated January 14, 1966, Runyon then requested that this Court issue a certificate of probable cause, which request was denied by this Court on January 18, 1966, with leave to proceed in forma pauperis on any future appeal effort.

Because of the facts in this case, however, which are hereinafter described; because of the concern that often arises when the states are not given the first opportunity to determine the claims of state prisoners, as is principally recited in Part II of the *Miller* opinion; and because of the valid need to promote har-

monious state-federal relations, in the manner which is outlined in Part III of *Miller*, this Court now considers it proper to reconsider, on its own motion, Runyon's request for Federal habeas corpus.

Accordingly, this Court notes that Runyon's only attempt to obtain state post conviction review was his October 2, 1965, petition to the West Virginia State Supreme Court of Appeals. This Court further notes that while Runyon may therein have hinted at additional grounds for state habeas corpus relief,[1] it is manifest that the contention on which he intended his petition to succeed was the alleged ineffective assistance of his court appointed counsel. This contention, however, necessitates a factual determination as previously recited by this Court in *Miller*. Finally, this Court notes that rather than return to the proper state forum, in the manner suggested by *Miller*, and thereby exhaust his state remedies under the purview of 28 U.S.C. 2254, Runyon chose to come before this Court with the same contentions he had brought before the West Virginia State Supreme Court of Appeals, thereby depriving the West Virginia courts the first opportunity to correct any Federal constitutional deprivations which may exist.

For these reasons, therefore, this Court deems it necessary not to rescind its January 12, 1966, order, dismissing Runyon's Federal habeas corpus petition as premature. Because of the above-referred to concern which these types of proceedings create, and because of the ever-present need to reexamine and redefine, if need be, the existing Federal policy on exhaustion of state remedies, this Court now determines that it is proper to grant a certificate of probable cause in this matter, with leave to proceed in forma pauperis. Accordingly, an order will be so entered.

ROBERT E. MAXWELL
United States District Judge

February 16th, 1966.

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1. On page three of his petition to the West Virginia State Supreme Court of Appeals, Runyon suggested that he was not given sufficient time in which to hire counsel, but was forced to accept court appointed counsel and that his guilty plea as to the entering without breaking was not intelligently offered. These allegations seem to have been made only in passing and do not appear to have been primary contentions for relief. To the extent that these allegations might suggest grounds for Federal habeas corpus relief, however, it is apparent that they also necessitate prior factual determinations and, therefore, constitute failure of exhaustion of state remedies under *Miller*.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,493.

STANLEY SHEFTIC,
Appellant,

vs.

OTTO C. BOLES, WARDEN
OF THE WEST VIRGINIA STATE PENITENTIARY,
Appellee.

No. 10,515.

JOHN HOWARD RUNYON, JR.,
Appellant,

vs.

OTTO C. BOLES, WARDEN
OF THE WEST VIRGINIA STATE PENITENTIARY,
Appellee.

Appeals from the United States District Court
for the Northern District of West Virginia,
at Elkins. Robert E. Maxwell, District Judge.

(Argued June 23, 1966. Decided May 4, 1967.)

Before BOREMAN and BRYAN, Circuit Judges,
and LEWIS, District Judge.

John D. Phillips, Jr., and Arthur M. Recht (Court-assigned counsel) for Appellants, and George H. Mitchell, Assistant At-

torney General of West Virginia, (C. Donald Robertson, Attorney General of West Virginia, on brief) for Appellee.

BOREMAN, Circuit Judge:

These are appeals from orders of the United States District Court for the Northern District of West Virginia denying habeas corpus relief to prisoners in custody of the State of West Virginia. Since the same legal issue is present in both cases we consider them together.

Petitioner, Runyon, was indicted on July 3, 1961, in the Circuit Court of Wayne County, West Virginia, for breaking and entering. Counsel was appointed to represent him at trial. He first pleaded not guilty but subsequently changed his plea to guilty and was sentenced to confinement in the state penitentiary at Moundsville, Marshall County, West Virginia, for a term of one to ten years. On October 2, 1965, he filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of West Virginia, charging that he had been denied the effective assistance of counsel. This petition was denied without a hearing on October 18, 1965. Thereafter, on December 14, 1965, Runyon filed a petition for a writ of habeas corpus in the United States District Court which petition was denied by order dated January 12, 1966, and the case was dismissed for failure to exhaust state remedies.

Petitioner, Sheftic, was indicted in April 1941 in Hancock County, West Virginia, on two charges of breaking and entering. He pleaded guilty and was sentenced to confinement in the state penitentiary. On November 4, 1943, the warden of the prison instituted proceedings under the West Virginia Habitual Criminal Statute,[1] charging that Sheftic had four previous felony convictions. After a jury trial in which the sole issue was as to his identity Sheftic was sentenced to life imprisonment. Sheftic has filed various petitions for writs of habeas corpus in the Supreme Court of Appeals of West Virginia. On November 23, 1964, his latest petition filed in that court was denied without

1. W. Va. Code, ch. 62, art. 8, § 4 (1931).

a hearing. In essence, his petition charged that the West Virginia statute authorizing the warden to institute recidivist proceedings was void and that the original guilty plea had been coerced. Subsequently Sheftic filed his petition in the court below for a writ of habeas corpus. This petition was denied also on the ground that Sheftic had failed to exhaust his state remedies.

THE DECISION IN MILLER V. BOLES

The district court based its denial of these petitions on its earlier decision in *Miller* v. *Boles*, 248 F. Supp. 49 (N.D. W. Va. 1965). That decision sought to clarify the guidelines which should govern federal district courts in determining whether to entertain a state prisoner's petition for habeas corpus relief. The court there pointed out that the recent Supreme Court decisions in *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Townsend* v. *Sain*, 372 U.S. 293 (1963), have extricated the federal habeas corpus remedy from the "procedural pitfalls which often foreclosed relief without a decision on the merits." 248 F.Supp. at 51. The court recognized the teaching of *Townsend* v. *Sain*, *supra*, which directs federal district courts to hold evidentiary hearings whenever the facts are in dispute and where the "habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." 372 U.S. 293 at 312-313, quoted with approval 248 F.Supp. at 53, n. 15.

However, the court in *Miller* concluded that the results reached in *Fay* v. *Noia* and *Townsend* v. *Sain* were chaotic for federal district judges and that these decisions had engendered criticism of federal encroachment upon "the prerogatives of State criminal justice." 248 F.Supp. 53. It stated its opinion that the solution to the problems created by the expansion of the remedy of federal habeas corpus was the federal policy of exhaustion of remedies embodied in 28 U.S.C. § 2254 as amended. Pub. L. No. 89-711 (Nov. 2, 1966). This statute provides in part as noted in the margin below.[2]

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2. "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the

The *Miller* court emphasized that the exhaustion doctrine had nothing to do with federal jurisdiction to hear petitions by state prisoners but was grounded on principles of comity and a desire to give state courts the first opportunity to redress invalid state convictions. It then undertook to apply these principles to the practice in West Virginia noting that the usual postconviction remedy in the state was via habeas corpus. The State Constitution and statutes provided for original habeas corpus jurisdiction in both the Supreme Court of Appeals[3] and the circuit courts,[4] with appellate jurisdiction in the Supreme Court of Appeals to review the action of the circuit courts.[5] However, the court ultimately concluded that the application to the circuit court was the appropriate method of seeking postconviction relief, observing that the Supreme Court of Appeals "does not appear to have the facilities to hold evidentiary hearings on original writs addressed to it."[6] 248 F.Supp. at 60. Reasoning that applications to the West Virginia Supreme Court of Appeals would result in hearings only if that court exercised its discretion, the district court determined that "[a]s a practical matter the circuit court is the forum to petition in order to get a full State court evidentiary hearing." 248 F.Supp. at 61. Accordingly, it held that since Miller had filed his petition for habeas corpus only in the Supreme Court of Appeals and not in the circuit court he had not exhausted his state remedies. Miller's petition was dismissed.

In dismissing the petitions of prisoners Runyon and Sheftic in the instant cases the district court simply stated that its action was based on its decision in *Miller*. Counsel for these prisoners

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remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

3. W. Va. Const., art. VIII, § 3, W. Va. Code, § 53-4-1 (1966).
4. W. Va. Const., art. VIII, § 12, W. Va. Code, § 53-4-1 (1966).
5. W. Va. Code, § 58-1 (e) (1966).
6. The court pointed out, however, that the Supreme Court of Appeals had the power to transfer the case to an appropriate court for a hearing. W. Va. Code, § 53-4-2 (1966).

argue that the prisoners chose one of two alternative methods available under state law to attack their convictions and that they are not required to exhaust both alternatives to satisfy § 2254; that it would be futile to expect the circuit court to grant hearings after the Supreme Court of Appeals had denied the prisoners relief on the identical claims they would urge before the circuit court; and, that the court in *Miller* v. *Boles, supra* 248 F. Supp. 49, makes two erroneous assumptions: (1) that the scope of habeas corpus in West Virginia is akin to federal habeas corpus, and (2) that the circuit courts do grant full and fair evidentiary hearings. Petitioners' counsel cite two recent decisions of the West Virginia Supreme Court of Appeals to support their contention that there is much confusion as to whether all constitutional violations can be raised via state habeas corpus.[7] It was stated to us during argument that since the district court's decision in *Miller v. Boles* 111 petitions for habeas corpus have been filed in the Circuit Court of Marshall County, said county being the site of the state penitentiary, and only one has been granted. It is urged that as a practical matter it is virtually impossible to secure an evidentiary hearing in the West Virginia state courts.

We conclude that these judgments of the district court in the instant cases should be reversed and that the decision in *Miller* v. *Boles,* from which no appeal was taken, must be disapproved.

When these prisoners filed their petitions for habeas corpus in the Supreme Court of Appeals they were utilizing an avenue of relief opened to them by both the West Virginia Constitution and statutes.[8] No law or constitutional provision required them to first seek habeas corpus relief in any circuit court of West Virginia. The only requirement that prisoners first present their petitions for writs of habeas corpus in the state's circuit courts is found in the decision in the *Miller* case where the court attempted to apply the principle of comity embodied in 28 U.S.C. § 2254, despite the provision in the West Virginia Constitution

7. State ex rel. Scott v. Boles, ... W. Va: ...., 147 S.E.2d 486 (1966); State ex rel. Smith v. Boles, ... W. Va. ....., 146 S.E.2d 585 (1965).

8. See notes 3, 4, and 5.

that application could be made originally to the Supreme Court of Appeals.[9]

While the Supreme Court of the United States has not decided this precise question it has held in other circumstances that where two alternative methods exist it is necessary to utilize only one in order to give the state courts an opportunity to consider and pass upon the matter presented. See *Brown* v. *Allen*, 344 U.S. 443, 447-450 (1953); *Darr* v. *Burford*, 339 U.S. 200, 204 (1950); *Wade* v. *Mayo*, 334 U.S. 672, 677 (1948). In *United States ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (3 Cir. 1952), it was held that a petition for a writ of habeas corpus to the Supreme Court of Pennsylvania and the denial of certiorari by the United States Supreme Court were sufficient to exhaust state remedies despite the fact that the lower courts of the state could entertain petitions for writs of habeas corpus. The court explained that while a denial of habeas corpus was not res judicata "we are nonetheless of the opinion that no lower Pennsylvania Court could be reasonably expected, in view of the action of the Supreme Court of Pennsylvania and of the Supreme Court of the United States, to grant the writ to Almeida." *Id.* at 824. See *Lane* v. *Warden, Maryland Penitentiary*, 320 F. 2d 179 (4 Cir. 1963).

While the 1967 amendment to the West Virginia statute clearly states that a matter will not be considered to have been previously adjudicated unless there has been a full and fair hearing in the state courts, or a waiver by the prisoner, we do not feel that these prisoners should now be relegated to the state courts.

9. Subsequent to the decision in Miller v. Boles, *supra*, and subsequent to the presentation of arguments on this appeal the legislature of West Virginia revised the habeas corpus law and postconviction procedure, reaffirmed the constitutional provision vesting original jurisdiction in the state Supreme Court by giving that court authority to grant the writ in the first instance, hold hearings and/or take evidence upon the return of such writ. The legislature did not accept the formula of Miller v. Boles and, at least by implication, rejected such approach. Enrolled S.B. No. 38 (Jan. 25, 1967), amending West Virginia Code, chapter 53, by adding thereto a new Article 4A. This amendment provides that West Virginia prisoners may now raise federal constitutional issues in the state courts, W. Va. Code, § 53-4A-1(a) (1967 amendment); and that they must be given a full and fair evidentiary hearing, W. Va. Code, § 53-4A-7(a) (1967 amendment). The amendment further provides that the court hearing the matter must make findings of fact, state conclusions of law and the grounds, state or federal, on which resolution of the prisoner's claim is based. W. Va. Code, § 53-4A-7(c) (1967 amendment). This 1967 amendment appears to afford adequate postconviction remedies to West Virginia prisoners.

In *Case* v. *Nebraska*, 381 U.S. 336 (1965), the Supreme Court, after granting certiorari to determine whether Nebraska had to provide its prisoners with a procedure to raise federal constitutional issues, took notice of a Nebraska legislative amendment providing such a remedy and dismissed the writ and remanded to the Supreme Court of Nebraska. However, that case is distinguishable from the cases here on appeal. The Nebraska Supreme Court had previously held it had no authority to hear the prisoner's case, while the Supreme Court of Appeals of West Virginia clearly had such authority, even prior to the recent amendment. In addition, in *Case* v. *Nebraska*, the prisoner had not reached the lower federal courts and there was no real issue of exhaustion of remedies. In the instant case the prisoners are in the federal courts and the state has had ample opportunity to pass on their claims for relief. While there has been no decision on the merits in the cases before us we think that the comity principles embodied in § 2254 do not require a return of these cases to the state courts for presentation of the identical claims anew.

These cases at bar are also distinguishable from *White* v. *Swenson*, 261 F. Supp. 42 (1966), a decision by the federal district court for Western Missouri sitting en banc. The court indicated that the state courts should be given every opportunity to rule on the merits of the prisoner's claim before the federal courts entertained habeas corpus petitions. However, that court was not confronted with the situation[10] where, as here, state prisoners have reasonably satisfied every possible demand made upon them by West Virginia law as it existed at the time they filed their petitions with the Supreme Court of Appeals for postconviction relief. These prisoners have waited too long to now be told to return to the state courts of West Virginia with the same claims they presented there as early as 1964. Any tangential benefits which might accrue to the cause of federalism by directing these prisoners back to the state courts are greatly outweighed by the real benefit to these prisoners by permitting them

10. The actual issue before the court in White v. Swenson, supra, was whether a state prisoner whose appeal had been dismissed in the state courts for failure to timely move for a new trial had exhausted his state remedies. The court held that he should file a motion for state postconviction relief before coming to the federal courts. 261 F. Supp. 56-57.

to finally present their claims in the federal courts. The judgments of the district court will be reversed and these cases remanded to that court for further proceedings consistent with this opinion.

Reversed and Remanded.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,493

STANLEY SHEFTIC,
Appellant,

versus

OTTO C. BOLES, Warden of the West Virginia State Penitentiary,
Appellee.

No. 10,515

JOHN HOWARD RUNYON, JR.,
Appellant,

versus

OTTO C. BOLES, Warden of the West Virginia State Penitentiary,
Appellee.

ORDER DENYING REHEARING EN BANC

The Petition for Rehearing En Banc filed herein by the Appelle on June 5, 1967, having been fully considered by all the judges of this court and all being of the opinion that the prayer of said Petition should be denied, accordingly it is

ORDERED that a rehearing en banc be and the same is hereby denied.

The judges whose signatures appear below are duly authorized and directed to sign this order for the court.

HERBERT S. BOREMAN
United States Circuit Judge
ALBERT V. BRYAN
United States Circuit Judge

A true copy,
Teste:

MAURICE S. DEAN, Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

TITLE 28, U.S.C.A. § 2241

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105.

TITLE 28, U.S.C.A. § 2254

State custody; remedies in State Courts

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967.

HISTORICAL AND REVISION NOTES

Reviser's Note. This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S.Ct. 448, 321 U.S. 114, 88 L.Ed. 572). 80th Congress House Report No. 308.

Senate Revision Amendment. Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that

the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequae remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

WEST VIRGINIA CODE, CHAPTER 51, ARTICLE 1, SECTION 3, as amended

Jurisdiction

The supreme court of appeals shall have original jurisdiction in cases of habeas corpus, mandamus and prohibition. It shall have appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator, or concerning a mill, road, way, ferry or landing, or the right of a corporation or county to levy tolls or taxes; in cases of quo warranto, habeas corpus, mandamus, certiorari and prohibition, and in cases involving freedom or the constitutionality of a law. It shall have appellate jurisdiction in criminal cases where there has been a conviction for felony or misdemeanor in a circuit court, and where a conviction has been had in any inferior court and been affirmed in a circuit court, and in cases relating to the public revenue, the right of appeal shall belong to the State, as well as the defendant, and such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law. (Code 1849, c. 160, § 3; Const. 1851, art. 6, § 11; Code 1860, c. 160, §§ 3, 4, 5; Const. 1863, art. 6, § 8; 1863, c. 17, § 1; 1868, c. 113, § 4; Const. 1872, art. 8, § 3; same, as amended in 1880; 1872-3, c. 16, § 4; 1882, c. 156, § 4; 1915, c. 68, § 4; Code 1923, c. 113, § 4.)

WEST VIRGINIA CODE, CHAPTER 51, ARTICLE 2, SECTION 2, as amended

Jurisdiction

The circuit court shall have supervision and control of all proceedings before justices and other inferior tribunals, by mandamus, prohibition and certiorari. They shall, except in cases confined exclusively by the Constitution to some other tribunal, have original and general jurisdiction of all matters at law where the amount in controversy, exclusive of interest, exceeds fifty dollars; of all cases of habeas corpus, mandamus, quo warranto and prohibition; of all cases in equity, including jurisdiction in equity to remove any cloud on the title to real property, or any part thereof, or any estate, right or interest therein, and to determine questions of title with respect thereto, without requiring allegations or proof of actual possession of the same; and of all crimes and misdemeanors. They shall have appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error or supersedeas may be allowed to the judgment or proceedings of any inferior tribunal. They shall also have such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law. (Code 1849, c. 158, § 3; Code 1860, c. 158, § 5; Const. 1863, art. 6, § 6; art. 11, § 3; Code 1868, c. 112, § 1; Const. 1872, art. 8, § 12; same, as amended in 1880; 1872-3, c. 15, §§ 3, 16; 1881, c. 3, § 2; Code 1923, c. 112, § 2; 1929, c. 36.)

WEST VIRGINIA CODE, CHAPTER 53, ARTICLE 4, SECTION 1, as amended

When and by whom writ granted

The writ of habeas corpus ad subjiciendum shall be granted forthwith by the supreme court of appeals, or any circuit court, or any other court given power by an particular statute to grant the same, or any judge of either court in vacation, to any person who shall, by himself or by someone in his behalf, apply for the same by petition, showing by affidavit or other evidence probable cause to believe that he is detained without lawful authority. (Code 1849, c. 156, § 1; Code 1860, c. 156, § 1; Code 1868, c. 111, § 1; Const. 1872, art. 8, §§ 3, 12, 27; 1872, c. 60, § 1; Const. Amend. 1880, art. 8, §§ 3, 12; 1883, c. 8, § 1; Code 1923, c. 111, § 1.)

WEST VIRGINIA CODE, CHAPTER 53, ARTICLE 4A, SECTION 1, as amended

Right to habeas corpus for post-conviction review; jurisdiction; when contention deemed finally adjudicated or waived; effect upon other remedies

(a) Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence. Any such petition shall be filed with the clerk of the supreme court of appeals, or the clerk of any circuit court, said supreme court of appeals and all circuit courts of this State having been granted original jurisdiction in habeas corpus cases by the Constitution of this State, or with the clerk of any court of record of limited jurisdiction having criminal jurisdiction in this State. Jurisdiction is hereby conferred upon each and every such court of record of limited jurisdiction having criminal jurisdiction (hereinafter for convenience of reference referred to simply as a "statutory court") to refuse or grant writs of habeas corpus ad subjiciendum in accordance with the provisions of this article and to hear and determine any contention or contentions and to pass upon all

grounds in fact or law relied upon in support thereof in any proceeding on any such writ made returnable thereto in accordance with the provisions of this article. All proceedings in accordance with this article shall be civil in character and shall under no circumstances be regarded as criminal proceedings or a criminal case.

(b) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

(c) For the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been waived when the petitioner could have advanced, but intelligently and knowingly failed to advance, such contention or contentions and grounds before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, unless such contention or contentions and grounds are such that, under the Constitution of the United States or the Constitution of this State, they cannot be waived under the circumstances giving rise to the alleged waiver. When any such contention or contentions and grounds could have been advanced by the petitioner before trial, at trial, or on direct appeal (whether or not said petitioner actually took an appeal), or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding

or proceedings instituted by the petitioner to secure relief from his conviction or sentence, but were not in fact so advanced, there shall be a rebuttable presumption that the petitioner intelligently and knowingly failed to advance such contention or contentions and grounds.

(d) For the purposes of this article, and notwithstanding any other provisions of this article, no such contention or contentions and grounds shall be deemed to have been previously and finally adjudicated or to have been waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding or proceedings in which said question otherwise may have been waived, any court whose decisions are binding upon the supreme court of appeals of this State or any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or the Constitution of West Virginia, or both, impose upon State criminal proceedings a procedural or substantive standard not theretofore recognized, if and only if such standard is intended to be applied retroactively and would thereby affect the validity of the petitioner's conviction or sentence.

(e) The writ of habeas corpus ad subjiciendum provided for in this article is not a substitute for nor does it affect any remedies which are incident to the criminal proceedings in the trial court or any remedy of direct review of the conviction or sentence, but such writ comprehends and takes the place of all other common law and statutory remedies, including, but not limited to, the writ of habeas corpus ad subjiciendum provided for in article four [§ 53-4-1 et seq.] of this chapter, which have heretofore been available for challenging the validity of a conviction or sentence and shall be used exclusively in lieu thereof: Provided, that nothing contained in this article shall operate to bar any proceeding or proceedings in which a writ of habeas corpus ad subjiciendum is sought for any purpose other than to challenge the legality of a crimnial conviction or sentence of imprisonment therefor. A petition for a writ of habeas corpus ad subjiciendum in accordance with the provisions of this article may be filed at any time after the conviction and sentence in the criminal proceedings have been rendered and imposed and the time for the taking of an appeal with respect thereto has

expired or the right of appeal with respect thereto has been exhausted. (1967, c. 85.)

Effective date.—The act adding this article was passed on Jan. 25, 1967, and made effective from passage.

THE OFFICIAL CODE OF WEST VIRGINIA OF 1931, CHAPTER 62, ARTICLE 8, SECTION 4

Procedure in Sentencing Convicts to Further Confinement for Second and Third Offenses

When a prisoner convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under sections eighteen or nineteen, article eleven, chapter sixty-one of this Code, the warden of the penitentiary shall give information thereof, without delay, to the said circuit court of the county of Marshall, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment. The said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of conviction and alleging the identity of the prisoner with the person named in each, shall require the convict named to say whether he is the same person or not. If he say he is not, or remain silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If the jury find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by article eleven, chapter sixty-one of this Code, on a second or third conviction, as the case may be. (Code 1849, c. 215, §§ 2, 3, 4, 5; Code 1860, c. 215, §§ 2, 3, 4, 5; 1868, c. 105, §2; Code 1868, c. 165, §§ 2, 3, 4, 5; Code 1923, c. 165, §§ 2, 3, 4, 5.)